

BEFORE THE
FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON, D.C. 20554

RECEIVED

MAY 28 1993

FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

IN THE MATTER OF

REPLACEMENT OF PART 90 BY PART 88
TO REVISE THE PRIVATE LAND MOBILE
RADIO SERVICES AND MODIFY THE
POLICIES GOVERNING THEM

)
)
) PR DOCKET NO. 92-235
)
)
)

COMMENTS OF SOUTHWESTERN BELL CORPORATION

JAMES D. ELLIS
WILLIAM J. FREE
PAULA J. FULKS
175 E. HOUSTON, RM. 1218
SAN ANTONIO, TX 78205
(210) 351-3424

ATTORNEYS FOR
SOUTHWESTERN BELL CORPORATION

MAY 28, 1993

No. of Copies rec'd
List A B C D E

CHS

TABLE OF CONTENTS

	<u>PAGE</u>
SUMMARY	i
I. INTRODUCTION	1
II. ELIGIBILITY LIMITATIONS CONTAINED IN PROPOSED RULE SECTION 88.17, LIMITING WIRELINE COMMON CARRIERS TO A "NON-CONTROLLING INTEREST" IN SMRS, IS CONTRARY TO THE PUBLIC INTEREST, INADEQUATELY SUPPORTED BY THE RECORD AND AN UNLAWFUL DISCRIMINATION AMONGST SIMILARLY SITUATED PROVIDERS	2

SUMMARY

SBC supports the FCC's effort to condense and simplify the rules regarding private land mobile radio services. The Corporation opposes, however, any restriction on the eligibility of wireline common carriers for Specialized Mobile Radio Systems. Thus, SBC opposes the Commission's proposal to allow wireline common carriers to hold a non-controlling interest only in such licensees. In 1986 the FCC admitted that it never demonstrated a public interest rationale for any wireline eligibility restriction when that rule was first adopted and that any rationale which could be speculated as the basis for the rule was outmoded. Further, the Commission believed then that the interests of increasing competition and encouraging more efficient use of spectrum supported expanding the SMR market to wireline common carriers. As SBC demonstrates, the SMR market is even more competitive today.

SBC contends that these reasons for increasing eligibility are so strong that adoption of any restriction, even the more modest one proposed in this docket, would be contrary to the public interest and totally unsupported by any record evidence. SBC's subsidiary, Metromedia Paging Services, has provided SMR service pursuant to waivers granted by the FCC for nearly seven years without ANY complaint by interconnecting carriers, a fact which also strongly suggests that the public interest would not be

harmd by a rule allowing wireline common carrier entry. Finally, the fact that the Commission allows other common carriers, such as interexchange carriers, to provide SMR service suggests that the proposed new rule excluding wireline carriers is unlawfully discriminatory.

SBC also points out that the Commission's new spectrum sharing standards, while perhaps useful in encouraging spectrum efficiency, will subject SWBT to substantial cost over the near term. To allow the Company to defer this expense without seeking additional rate

BEFORE THE
FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON, D.C. 20554

RECEIVED
MAY 28 1993
FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

In the Matter of)
Replacement Of Part 90 By Part 88)
To Revise The Private Land Mobile)
Radio Services And Modify The)
Policies Governing Them)

PR Docket No. 92-205

INITIAL COMMENTS OF SOUTHWESTERN BELL CORPORATION

Southwestern Bell Corporation ("SBC"), provides these *Initial Comments* in response to the Commission's *Notice of Proposed Rule Making* ("NPRM") released November 6, 1992¹ on behalf of itself and its subsidiaries, including Southwestern Bell Telephone Company ("SWBT"), a wireline common carrier in the business of providing local exchange telephone service in five states, and Southwestern Bell Mobile Systems, Inc. ("SBMS"), a provider of wireless telecommunications services.

I. INTRODUCTION.

SBC applauds and supports the Commission's enunciated purposes in issuing this NPRM: ". . . to increase channel capacity . . ., to promote more efficient use of these channels, and to simplify . . . policies governing the use of these bands by a wide variety of small and large businesses and public safety agencies throughout

¹As modified by its *Order Extending Comment and Reply Comment Periods* adopted February 8, 1993.

this nation."² SBC also supports the Commission's intentions "to develop a new set of rules that are flexible and simple" SBC's input, therefore, is limited to two items with which the Corporation takes issue. First, SBC objects to two limitations on eligibility proposed by the Commission relating to Specialized Mobile Radio Systems ("SMR"). Second, SBC raises a concern over the expense which will be incurred by operating companies like SWBT if they are required to move to the spectrum-efficient standards proposed by the new rules.

II. ELIGIBILITY LIMITATIONS CONTAINED IN PROPOSED RULE SECTION 88.17, LIMITING WIRELINE COMMON CARRIERS TO A "NON-CONTROLLING INTEREST" IN SMRS, IS CONTRARY TO THE PUBLIC INTEREST, INADEQUATELY SUPPORTED BY THE RECORD AND AN UNLAWFUL DISCRIMINATION AMONG SIMILARLY SITUATED

supports the Commission's attempt to liberalize the current outright prohibition of the rules. Nonetheless, as the history of this area amply demonstrates, any restriction on the eligibility of licensees, particularly that which would prohibit qualified and financially secure providers of SMRS service, should be abandoned.

In the Commission's PR Docket No. 86-3, In the Matter of Amendment of Part 90 of the Commission's Rules Governing Eligibility for the Specialized Mobile Radio Services in 800 MHz Land Mobile Band (hereinafter "SMR Eligibility Docket"), this Commission initially proposed to eliminate the wireline restriction on the ground that this change would make available more efficient service to the public by enhancing competition.⁴ The Commission observed

935-940 MHz bands, wire line telephone common carriers are restricted to a non-controlling interest in any SMRS.

The current rule, Section 90.603, reads: "The following persons are eligible for licensing in the 806-824 MHz, 851-869 MHz, 896-901 MHz, and 935-940 MHz bands: [c] any person, except for wireline telephone common carriers, eligible under this part and proposing to provide on a commercial basis base station and ancillary facilities as a Specialized Mobile Radio System operator"

⁴During the pendency of that proceeding, the Commission granted additional waivers of the wireline restriction to SBC and PacTel, allowing them to acquire control of certain SMR licenses pending the outcome of the proceeding. Letter of Michael T.N. Fitch to Jeremy Cortney, dated December 19, 1986; letter of Michael T.N. Fitch to Thomas J. Dougherty, dated December 31, 1986. Waivers were also subsequently granted to Advanced Paging Services, U S West Paging, and Bell Atlantic Enterprises. Additionally, on the Private Radio Bureau issued its letter to BellSouth indicating that it would not apply the prohibition to a proposed acquisition.

in the NPRM that elimination of the restriction would create an unregulated, competitive marketplace environment for the development of telecommunications by eliminating unnecessary regulations and policies.⁵ The Commission even admitted that the origin of the wireline restriction was never explicitly discussed either in the docket imposing it or any subsequent proceedings.⁶ Thus, contrary to statute and the most basic principles of administrative law, the wireline restriction was imposed and remains in place without the required public interest determination being discussed, much less made. As such, the rule is and remains invalid. See *Home Box Office, Inc. v. FCC*, 567 F.2d 9, 35-36 (D.C. Cir. 1977).

The Commission's instant attempt to adopt a wireline carrier eligibility restriction in a new, reorganized rule category cannot avoid its statutory obligation to determine whether any compelling public interest requires such a distinction and whether any existed when the rule was adopted. *Id.* Without any record support, the Commission's adoption of any wireline carrier eligibility restriction, even a modified one, would be void

of 49% of RAM Data Systems on the apparent ground that BellSouth did not appear to be seeking a controlling interest in RAM.

⁵NPRM, PR Docket No. 86-3, released January 10, 1986, paras. 6 and 7.

⁶Order Terminating Proceeding, PR Docket No. 86-3, released July 15, 1992, para. 2.

ab initio. *Id.* This legal principle is particularly applicable when, as here, the Commission itself recognizes that circumstances surrounding the adoption of the initial rule have changed since the rule was adopted.⁷ Given these circumstances, the Commission's attempt to adopt by omission a restriction about which the Commission is at best ambivalent, and at worst uninformed, simply cannot be sustained under any legitimate burden of administrative rule making.

B. The Status Of Today's SMR Markets Demonstrates The Public Benefit In Allowing Wireline Common Carriers To Participate In This Business.

The SMR public would be served best by a wide choice of carriers vying for their business with an array of innovative and customized applications. Experience in this market indicates that such demand is both stimulated and, increasingly, satisfied by wireline carrier participation.

As noted above, SBC obtained a conditional waiver of the current wireline restriction in 1986, pending the outcome of the PR Docket No. 86-3, to allow SBC to acquire the assets of Metromedia Paging Services, Inc. ("MPS"). That acquisition, part of a much larger undertaking which included cellular services, added a largely growing and intensely competitive set of markets and services to the SBC family. In those markets where demand for SMR services is increasing, the number of SMR customers served by MPS has

⁷Order Terminating Proceeding, PR Docket 86-3, para. 4.

increased dramatically. In fact, subsequent to the grant of the conditional waiver, MPS was granted additional channels by the FCC to allow it to accommodate the growing demand by its customers. MPS has significantly increased the number of customers and channel capacity it brought to SBC in 1987.⁸

Also since 1987, MPS has invested substantial amounts of money to upgrade and expand its SMR services, based largely upon this explosive growth in demand. Since its acquisition by SBC, MPS has expanded its SMR offerings to include: (1) two-way repeater services, (2) radio telephone service, (3) remote dispatch service, (4) vehicle location service, (5) fixed data service, (6) mobile data service, and (7) status message service. *Id.*, p. 4. Obviously, a significant portion of the public perceives that it has benefitted from SBC's ownership of SMR systems.⁹

⁸See SBC's Request for Permanent Waiver, PP Docket No.

SBC's experience in the SMR market matches that of the industry nationwide. There are now more than 6 thousand SMR systems in the United States operating more than 1 million units. The embedded infrastructure for SMR systems is valued at between 850 and 950 million dollars. Most analysts predict continuing steady growth and increasing competition. *Id.*, Appendix A, p. 2. Indeed, recent actions like that of Fleet Call in seeking nationwide licenses have led to the development of a nationwide digital SMR network.¹⁰ Continued growth in the number of SMR licensees and in the amount of capital generated by SMR service providers compels the conclusion that the holding of SMR licenses by affiliates of wireline common carriers, such as SBC, have had no anticompetitive impact on the market. Commission policy has permitted and encouraged SMR operations to become multi-service generalized mobile providers to an unlimited class of users, far from the specialized end user-oriented service originally contemplated when SMR service was introduced (and the wireline restriction implemented). In short, wireline carriers and their affiliates can bring to the SMR business the marketing, technical, and implementation expertise

future opportunity to provide such services were precluded by this docket.

¹⁰~~See In re Request of Fleet Call, File No. MW-00026~~

necessary to serve this expanding and demanding market
segment.

California, contained at least 94 licensed competitors in the fall of 1992.¹³

Apparently, the Private Radio Bureau tacitly agrees that wireline common carrier entry into the SMR market can be in the public interest. After SBC acquired the SMR licenses of MPS, all of its SMR renewal applications were routinely granted for the full five year term requested. Additionally, a number of requests by MPS for additional channel capacity were granted by the Bureau. Such grants would not have been made if the Bureau believed that MPS was not operating these systems in a manner consistent with the public interest. Significantly, while the SMR licenses held by SBC's affiliate cover 26 different market areas and have been in effect for at least 6 years,

is not based on any record support.¹⁴ Given that anomaly, the Commission had to resort in its Order Terminating PR Docket 86-3 to conjecture regarding the possible basis for the rule. One basis, that the restriction was necessary to prevent an equitable distribution of radio frequency among

Perhaps the most salient concern of the Commission, expressed for the first time in 1986 in the SMR Eligibility Docket, was the notion that wireline carriers might be able to impede other SMR licensees' interconnection to the wireline network, apparently through some control over its affiliate. The best reply to this objection, of course, is the continued provision of SMR services by SBC's affiliate without one single complaint by a competitor over unfair or discriminatory interconnection. Moreover, wireline carriers are already obligated to provide to nonwireline mobile service competitors "the same dial access interconnection facilities as those used by wireline common carriers" and to assess the same charges to non-affiliated as affiliated carriers with regard to such interconnection.¹⁸ Additionally, the Commission's oversight authority and the complaint procedures which provide adequate safeguards against any potential wireline

This purpose appears to have been abandoned by the Commission even prior to 1986, but certainly more recent FCC actions remove all doubt. After all, at the express permission and obvious delight of the Commission, companies as large and sophisticated as Fleet Call, AT&T, and large cellular common carriers, like McCaw Cellular, are eligible for and have been granted wide-spread SMR licenses.

The Fleet Call example is particularly probative of the illegitimacy of the "small entrepreneur" rationale. Fleet Call successfully obtained permission from this Commission to weave together a number of SMR systems, using digital transmission, into a network which is virtually identical to cellular common carrier service. The Commission has described this development as providing an opportunity for a third type of cellular service (i.e., wireline common carrier cellular service, nonwireline common carrier cellular service, and enhanced SMR service).²⁰ The opportunities provided by Fleet Call's proposal need not and should not be left, however, to a single national provider. Rather, the opportunity to use SMR licenses to provide a complement to cellular common carrier service is a potential weapon for intensifying competition in cellular-like services.

A restriction of SMR licenses to nonwireline carriers, therefore, merely limits the Commission's

²⁰Order Terminating Proceeding, PR Docket No. 86-3.

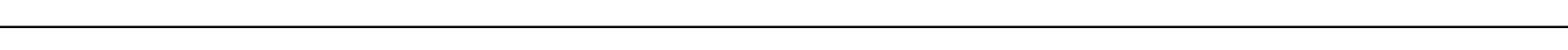

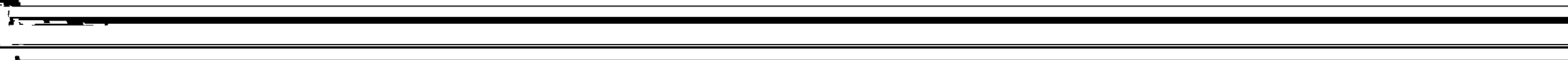





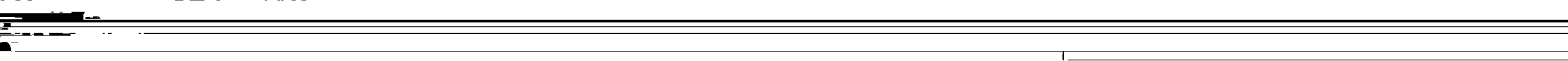



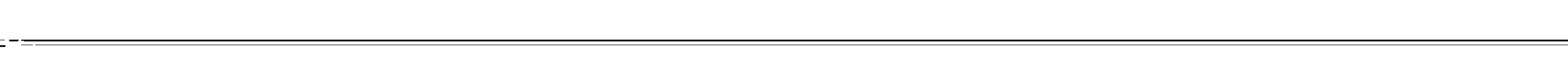
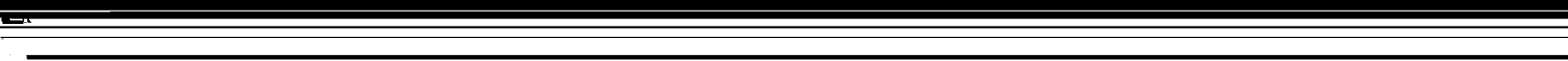






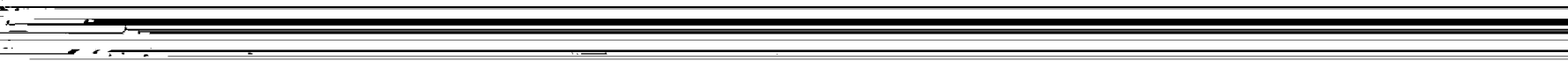
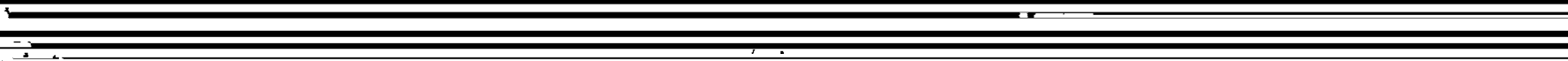


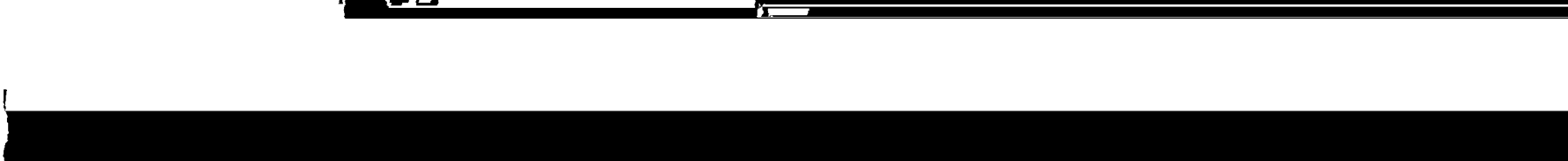
opportunities to encourage this innovative type of competition. While SBC is the wireline common carrier provider of cellular service in a number of markets in the five states in which SWBT provides local exchange service, it is not the wireline provider in any other state. Therefore, grant of SMR licenses to SBC in markets where SBMS does not provide service would provide the Commission with the opportunity to encourage the development of a third "cellular-like" set of services, while at the same time avoiding even the potential threat of discriminatory interconnection policies (given that in these areas, SBC would not be a wireline common carrier). Obviously, then, there is no reason for the Commission to adopt a policy which itself believes is unsupported at the time of adoption, involves limited utility now and may be wholly inadequate to the market of the future.

E. Events Subsequent To The Commission's NPRM In PR Docket 86-3 Provided Adequate Basis For Allowing Wireline Carriers To Provide SMR Service.

Contrary to the FCC's decision to terminate PR Docket 86-3, the reasons cited by the Commission actually provide a further basis for the wireline eligibility restriction's removal. The SMR industry has experienced tremendous growth in terms of both the number of SMR licensees and in the amount of capital generated by SMR.

factors do not indicate an industry in need of protection. To the contrary, they show that the industry is mature and highly competitive. In fact, the equity stock of at least two SMR companies has currently been publicly traded on the New York Stock Exchange, and one of these companies operates SMD properties in at least eight major cities.

and limits, rather than increases, competition in the relevant radio service markets. Such a result is plainly contrary to the public interest and this Commission's stated policy of providing the maximum number of stations under



Commission's NPRM and the appendices explaining the rules do not explicate this apparent inconsistency, one might conclude that the prohibition was included to be consistent with the Commission's prior decision prohibiting wireline ownership of 220-222 MHz stations. The Commission, however, has chosen the wrong rule with which to be consistent. Rather, the better course is to expand Commission policy which already allows wireline carriers to operate conventional SMR-like, two-way radio systems in every spectrum range below the 800 MHz band except for the 220-222 MHz band.

In addition to the above discussion of the inappropriateness of adopting a wireline eligibility

the inconsistency between proposed rule 88.17 and 88.1005 in itself renders the entire rule subject to being overturned on appeal as arbitrary and inconsistent in itself. The Commission offers no basis whatever for allowing wireline carriers to hold one type of SMR license while denying them the right to hold such licenses simply by virtue of the spectrum they use.

IV. THE COMMISSION SHOULD ALLOW LECS TO SELL EXCESS CAPACITY TO DEFRAY THE EXPENSE OF MEETING THE NEW SPECTRUM STANDARDS.

SBC understands and agrees with the Commission that the congestion of spectrum use in frequency bands below 512 MHz requires a flexible approach to allocation and license grants. Nonetheless, SBC would be remiss if it did not inform the Commission of the significant costs which will be incurred by telephone local exchange companies, like SWBT, if the spectrum efficiency proposals of the NPRM are adopted.

SWBT presently operates more than 240 telephone maintenance radio system transmitters/and receivers throughout its 5 state franchise area. In Texas alone, the largest state in which SWBT operates, the company uses 90 base station transmitters/receivers and owns 6,500 associated license mobile units. Each of SWBT's other states use between 100 and 300 transmitters and receivers

~~states use between 100 and 300 transmitters and receivers~~

and internal to SWBT. The system allows constant communication with these portions of SWBT's force, which is essential to high quality service provision, particularly when disaster strikes or emergencies arise.

If the spectrum efficiency standards of the NPRM are adopted as proposed, SWBT would incur significant costs to bring its system into compliance with the proposed bandwidth limits. Each of SWBT's existing transmitters, as well as the associated vehicle mobile radios, must be replaced or undergo significant modifications in order to move to the new spectrum standards proposed by this docket. This is because the new rules reduce the power allowable for each transmitter, which in turn will require an increased number of transmitters to cover the same area. Indeed, it is not clear that the current equipment in place in SWBT territory can be modified to meet the standards, but SWBT's

supplier has indicated that such modifications would be

similar services. If SWBT is required to share frequencies in the same band as nonwireline carriers, then it should be allowed to utilize these frequencies as any other company eligible for this service.

V. CONCLUSION.

SBC has made no secret of its interest in the SMR market. Long before the entry of Fleet Call into nationwide SMR business, SBC has vigorously pursued opportunities to provide SMR service through MPS. SBC's sale of MPS assets will not terminate that interest. Nor will it put to rest the serious issues raised by SBC's *Petition for Reconsideration and Request for Permanent Waiver*, still pending in PR Docket No. 86-3 some 9 months after those documents were filed. The checkered history of the Commission with regard to the wireline eligibility rule, beginning with its adoption wholly without support, the Commission's inability to justify the rule twelve years later, the Commission's tentative conclusion in 1986 that the rule was outdated, and its subsequent, abrupt reversal of that decision without adequate explanation in 1992, all suggest that this Commission is without any legally sufficient basis to adopt the proposed wireline eligibility restrictions. SBC applauds the limited liberalization of wireline eligibility rules contained in the Commission's intent to qualify the "non-controlling interest" exception to wireline in eligibility. This limited proposal, however,

is plainly inadequate to the purpose at hand. SBC urges the Commission to return to the coverage of its 1986 conviction and withdraw its wireline eligibility restrictions proposed in its NPRM herein.

Respectfully submitted,
SOUTHWESTERN BELL CORPORATION

By: Paula J. Fulks
James D. Ellis
William G. Free
Paula J. Fulks
175 E. Houston, Rm. 1218
San Antonio, TX 78205
(210) 351-3424

ATTORNEYS FOR
SOUTHWESTERN BELL CORPORATION

May 28, 1993

Appendix A

SBC'S EXISTING SMR SYSTEMS

WNBQ905 (5 Channels)	Santa Ana, California (serves LA)
KNBF695 (13 Channels)	San Antonio, Texas
WQA569 (5 Channels)	Dallas, Texas
KNAX849 (1 Channel)	Dallas, Texas (conventional)
KNFY957 (10 Channels)	Lake Villa, Illinois
KFI621 (20 Channels)	Chicago, Illinois
KNCD380 (15 Channels)	Madison, Wisconsin
WNAF813 (5 Channels)	Chicago, Illinois (located with KFI621)
WNGC337 (5 Channels)	Janesville, Illinois
WNFS456 (10 Channels)	Waukesha, Wisconsin
KNCE288 (20 Channels)	Philadelphia, Pennsylvania (Allentown)
KNER557 (5 Channels)	Pen Argyl, Pennsylvania
KNDC441 (5 Channels)	Newmanstown, Pennsylvania (Reading)
KNAH938 (5 Channels)	Atlantic City, New Jersey
WRE450 (5 Channels)	New York, New York
KNCD410 (10 Channels)	Summerdale, Pennsylvania (Harrisburg)
KNBC515 (5 Channels)	San Luis Obispo, California